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JAMES H. McKENNEY,
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Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 182.

HUTCHINSON, PIERCE & CO.,
Appellant,

vs.

JOSEPH LOEWY,
Respondent.

BRIEF OF ARGUMENT ON BEHALF OF APPELLANT.

C. G. Burgoyne, 72 to 78 Spring Street, New York.

Supreme Court of the United States.

HUTCHINSON, PIERCE & Co., Appellant, vs. JOSEPH LOEWY, Respondent.	October Term, 1909. No. 182.

BRIEF OF ARGUMENT ON BEHALF OF APPELLANT.

This is an appeal from a decision (R., p. 93) of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the Circuit Court for the Southern District of New York dismissing the bill in a suit in equity brought by a New York corporation to restrain the use by a citizen of New York of a trade-mark registered under the Act of Congress of February 20, 1905.

The appellant is the manufacturer of the well-known "Star" shirts and the owner of the trade-mark accurately defined in the certificate of registration as follows:

> "The trade-mark consists of the word 'Star' and the representation of a star, used singly or together" (R., p. 61).

The respondent uses on his shirts a mark (illustrated on pages 63, 64, 65) consisting of a star, with dots forming a tail, which he calls "Comet." The bill was filed to restrain the

use of the star—just that, and not the dots or word "Comet"—by the respondent.

The single question presented is, we think, whether the respondent may continue to use the appellant's registered trade-mark.

Both Courts below found that the appellant is the owner of a valid technical trade-mark, but held that the respondent's use of it—or what the court of first instance called "defendant's exaggerated point" (R., p. 83), and the Court of Appeals called the "solid five pointed star" (R. 92)—was not unlawful because, in view of the accessories accompanying it, confusion seemed to them improbable.

The conclusion as to appellant's trade-mark and the result reached in the Courts below placed side by side seem to be in effect: The appellant has a valid trade-mark, but it is hereby taken from it and made *publici juris*. This seems to be the result, because, in the words of this Court, "the right of individual appropriation once lost is gone forever" (Saxlehner v. Eisner, 179 U. S., p. 36; Saxlehner v. Wagner, 216 U. S. 381).

The jurisdiction of the Circuit Court resting solely upon a law of the United States (the Trade-Mark Act of February 20, 1905), and the decision of the Circuit Court of Appeals not being expressly made final, this appeal has been taken.

The Assignment of Errors.

What we respectfully venture to think was the fundamental error in the Courts below is in the view of the law which the opinions express and the decision more conspicuously illustrates. In substance and effect that view is that a technical trade-mark (and the years of painstaking efforts towards excellence and industry and expenditure, which it embodies) is no longer to be protected as other property, but is to be held subject to the imaginative powers of the particular tribunal before whom an appropriation may be brought, so

that, according to whether the mind of that tribunal pictures the future effect of the alleged infringement readily or otherwise, the property is protected or destroyed.

The result of this doctrine, we respectfully venture to suggest, is that enormous investments are made to depend upon nothing more reliable than a guess, and that an investment of great value, in the present instance, is impaired, if not destroyed, to no purpose but the discouragement of excellence and the encouragement of imposition and fraud.

In the case of a technical trade-mark, the *certainty* of protection, whereby investment in industries based on excellence is encouraged, is, we understand, the controlling consideration. That certainty cannot be secured by a rule which necessarily involves individual speculation in its application. It is secured only by the settled rule that a trade-mark is the property of its owner and that, *not the consequences* of its use by another but "*the fact* of its use by another creates a cause of action" (179 U. S. 677).

If the appellant has merely a right to be protected against the sale of the respondent's goods as its goods, the decision below may or may not be right—there is in the absence of satisfactory evidence concerning the past and future (which in the nature of things cannot be found) no possible way of being sure. If, on the other hand, the appellant has a right of property in its trade-mark, the decision should be reversed and the use and destruction of that mark by the respondent prevented.

The assignment of errors is as follows:

1. The Court erred in not holding that the complainant being the owner of a trade-mark for shirts, consisting of a star (whether verbally or pictorially expressed), and having duly registered the same under the Act of Congress, was entitled to an injunction restraining the unauthorized use by the defendant of a reproduction, counterfeit, copy, or colorable imitation, of such trade-mark, to wit, a star, regardless of dots or words

or other matter accompanying it, upon or in connection with the sale of merchandise of substantially the same descriptive properties.

2. The Court erred in holding that the complainant had registered a six pointed star and in not holding that the complainant owned and had registered as its trade-mark a star broadly, whether expressed pictorially or verbally.

3. The Court erred in basing its decision on the test prescribed as to registration by Section 5 of the Act of Congress of February 20, 1905, and in not applying the test prescribed as to infringement by Section 16 of said Act.

4. The Court erred in not granting an order and decree for mandate directing the Circuit Court of the United States for the Southern District of New York to vacate the final decree entered therein on the 13th day of January, 1908, and directing that a decree be entered therein granting the complainant the relief prayed for in the bill.

5. The Court erred in entering an order and decree for mandate affirming the final decree of the Circuit Court of the United States for the Southern District of New York, entered therein on the 13th day of January, 1908.

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The Pleadings.

The Bill of Complaint recites the commercial genealogy of the appellant, which owns and carries on a well-known business, established in 1840, of manufacturing shirts and analogous articles, identified by its star trade-mark and by nothing else; the facts which have given the mark its great value; the adjudications sustaining the mark and its registration under the Act of Congress of 1905. It complains that respondent is using this trade-mark in advertisements and on inferior shirts, and declines after protest to discontinue the use. It prays that the respondent be restrained from making use of the representation of a star in connection with shirts not of the appellant's production.

It is to be observed that the bill does not seek to interfere in any way with the respondent's use of anything except the appellant's trade-mark.

The answer in substance denies all the allegations of the bill, and alleges that the respondent's mark is a comet, and that it has been used by the respondent and his predecessors for many years.

The issue is thus a narrow one. It is not whether the use by the respondent of a representation of a comet or the word "comet" should be restrained. The bill does not seek to interfere with that in any way. As pointed out by the Court of first instance "a comet ordinarily has not the visible outline of a star" (R., p. 83). Its use would accomplish everything accomplished by respondent's mark except the destruction of appellant's property. The issue is simply whether the respondent may continue to use the representation of a star—what the Court of first instance calls "defendant's exaggerated point" (p. 83), the Court of Appeals "a solid five-pointed star" (p. 92) and what is in fact nothing more or less than appellant's trade-mark and property.

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The Facts.

The facts are comprised within two propositions neither of which has been seriously questioned: (1) For more than half a century the appellant has been the recognized owner of the exclusive right to use any representation of a star in connection with shirts and its business rests solely on that. (2) The respondent is in fact using a representation of a star upon competing shirts.

For years prior to the Civil War (p. 50; p. 55), and ever since, the appellant's shirts have been marked by a star, and identified and known by it, the practice having been from the first to rely upon the mark alone to indicate the genuineness and origin of the article, unaccompanied by the corporate or firm name or address (p. 40), and this manufacture, recognized, bought and sold, throughout the country by nothing but the mark, has during all these years been in great demand and the leading article of its kind in the market (p. 39).

As early as 1872, a decree was entered, by direction of his Honor, Judge SHIPMAN, in the Circuit Court for Southern District of New York, restraining the use by another of a star; and twenty years later a decree was entered in the Circuit Court for the Northern District of Illinois, after a careful opinion, reported in 51 Fed. 829 (p. 69, *et seq.*), which found that the appellant's predecessors were the owners and entitled to the exclusive use of the "star" mark in all its forms, and restrained the defendant from selling shirts bearing,—

> "The device or symbol of a Star, or the word 'Star' "used singly or together, or used singly or together "with the word 'Crescent' or device or symbol of a "crescent, or with any other word or device or symbol "whatever" (p. 70).

This we submit is an accurate definition of the appellant's rights. And if the word "Comet" and the device of dots used by the respondent be substituted for the word "Crescent," and the device of a crescent used by the defendant in the Blumberg case, the decree in that case becomes a decree herein.

The appellant's registration, under the present Act of Congress, is reproduced on page 61 of the record. Its shirt label is reproduced on page 63, and one of its many box labels (all of which bear the mark alone, displayed in different forms), is reproduced on page 62. In the registration, the mark is defined as "the word 'star,' and a representation of a Star, used singly or together." (Page 61.)

Because its business depends peculiarly on the mark alone, the appellant and its predecessors, from the first have been diligent in protecting the property thus defined. They have successfully maintained a great number of suits (p. 42); dealt with other approximators by correspondence (*Ib.*); issued warnings to the trade (p. 73), and in every way successfully protected their property in the mark upon which their business rests.

Shortly before this suit was instituted there appeared in a trade paper, called "The Haberdasher," an advertisement, the whole of which is reproduced on page 64 of the record, in the center of which was displayed the following:—

SHIRTS

The appellant, through its attorneys, thereupon wrote the respondent requesting him to discontinue the use of its trade-mark. Prior to this, the appellant had never heard of the use of any such mark by the respondent (p. 42). It was then introduced to the respondent's stationery, displaying the same

mark above reproduced, in red, the rest of the heading being black, (Complainant's Exhibit, Defendant's Letter Heads, page 65). The respondent having declined to discontinue the use of appellant's mark, the complainant succeeded in finding one of respondent's shirts in Connecticut, and instituted this suit (p. 18). The mark on this shirt is reproduced on page 63 of the record.

The respondent says that he has used his mark for a long time, but this (whatever may be the truth about it) is not material. There is no suggestion of prior, or anticipating use. The appellant had never heard of the respondent's mark until the appearance of the advertisement which led to this suit. As the record and decisions show (pp. 60, 66, 69, 73), the appellant has constantly asserted and defended its property in the use of a star as applied to shirts whenever knowledge of infringement has reached it. The respondent's operations have not been large enough to admit of a suggestion of constructive knowledge by appellant. There is thus no possible room for an imputation of laches.

It may be added that the proof is not that the respondent has used the symbol of a star in his mark for any considerable length of time, although it is immaterial whether he has or not. Two of his witnesses say that the mark formerly used by respondent was a comet with a point formed by nebulous matter, and not by a star or pointed figure (p. 76, p. 78). The statement of the third witness, the respondent, to the contrary, in view of the evasive character of his testimony is not, we think, persuasive. And under the rule established in McLean v. Fleming, 96 U. S., 258, and emphasized in Menendez v. Holt, 128 U. S., 523, and Saxlehner v. Eisner, 179 U. S., 19, the right to injunctive relief would remain even were there laches.

On these facts the appellant respectfully contends that it

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is a conclusion of law that the injunction sought should issue. That injunction does not in the remotest degree interfere with the use of the word "comet," or the ordinary representation of a comet. It simply prohibits the use of the appellant's property,—a representation of a star, which is essential to the preservation of its rights and business, and leaves the respondent unhampered in his efforts in any direction, other than that which consists in making use of and destroying the reputation of appellant's manufacture.

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THE LAW.

The use by the respondent of a representation of a Star (with or without added matter) is unlawful and should be restrained.

The appellant's trade-mark is valuable because it has acquired a meaning in the minds of purchasers, actual and prospective. The conception, idea or recollection by which they are influenced is necessarily not definite. They have many other things to think of. They have never been compelled to discriminate between various expressions of the idea, for they have always been able to rely upon any expression of the idea "Star", whether pictorial or verbal, as guaranteeing genuineness. The appellant for upwards of fifty years has used it in many forms on many differing labels. The necessary result is that any expression of the idea or recollection "Star" would be taken as complainant's mark. The number of points of the star, the accessories used with it and like details, if ever observed, are forgotten. The trade-mark is accordingly accurately defined in the certificate of registration as consisting of "the representation of a Star and the word 'Star', used separately or together." We submit that no one else can lawfully put upon a competing article any representation of a Star.

The Trade-mark Act of February 20th, 1905 (33 U. S. Statutes at Large Part 1, p. 724; U. S. Compiled Statutes Supplement of 1907, p. 1008), provides:

> "SEC. 16. That the registration of a trade-mark under the provisions of this Act shall be *prima facie* evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages,

wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use or shall have used such reproduction, counterfeit, copy or colorable immitation in commerce among the several States * * * shall be liable to an action for damages therefor at the suit of the owner thereof."

Section 19 provides that the courts "vested with jurisdiction of cases arising under the present Act shall have power to grant injunctions, according to the course and principles of equity, to prevent the violation of any right of the owner of a trade-mark registered under this Act."

The purpose of this statute is "to protect" trade-marks. Its interpretation seems plain in the light of the history of the subject. With the improvement of means of transportation came the distribution of goods. Marks of origin readily recognized and remembered upon those goods were the sole means of promoting a competition of excellence between manufacturers whose products were not sold to experts. Without marks of origin, competition in such products would necessarily resolve itself into a competition of imposition depending upon the superficial appearance of each anonymous article, with the reward to him who could give to the cheapest and most inferior the most fictitious appearance. By the protection of marks of origin alone is there secured a competition of excellence and energy depending on reputation, with the reward to him who by fair dealing induces purchasers to seek his goods because of their merit and his good name.

Marks of origin have, accordingly, been protected in one way or another since the distribution of goods began. And as the distribution of goods increased and the desirability of encouraging investments in industries based on excellence became more apparent and the temptation and tendency towards piracy became more marked, the law evolved the stringent rule,

which is enunciated in the statute, that a trade-mark is property to be protected as such.

The right recognized in the registrant is that of "ownership." The appellant owns, for purposes of use in connection with shirts, any expression of a star, verbal or pictorial. The violation condemned is the use of a "copy or colorable imitation" of a "representation of a star" either affixed to shirts or to signs or prints "intended to be used * * * in connection with the sale of" shirts.

The respondent is using "affixed" to his shirts and in advertisements "intended to be used in connection with the sale" of them that very thing, to wit, "a representation of a star." He may be using other things as well, but there is nothing in the statute or law which makes the use of other things in connection with the appropriated property a justification of the appropriation.

It has been accurately said that the action to restrain the use of a trade-mark "is in reality a specialized variety of the action" to prevent unfair competition, "having been divided off when property in a trade-mark was first adopted as the ground of jurisdiction" (Kerly, Trade-Marks, 4th Ed., p. 354).

The reason for this specialization may have been in part the necessity for providing a more certain and workable rule than the rule in actions of deceit, which like the rule prohibiting unfair competition is in its operation necessarily uncertain and in its application necessarily expensive and slow; and thus the encouragement of industry and excellence by holding out the certainty of adequate reward and the discouragement of experiments in the direction of fraud and commercial piracy.

In every relation in the law fundamental considerations of right and policy are by experience crystallized into fixed

rules, the adherence to which is essential to the correction of the evil at which the law aims. The trespasser in a particular instance may not injure my land, but it is none the less important that the rule that the trespass is unlawful should be applied. And so, long ago, in a trial *at law* for the infringement of a trade-mark where it was shown that no damage was occasioned, we find the Court saying: "If it occasioned him no specific damage, it was still to a certain extent an injury to his right" (Blofield vs. Payne, 4 Barn. & Adol., 410).

The appellant is seeking protection not against one infringer alone but against a class of manufacturers and dealers all over the country who have in the past constantly sought to avail themselves of the reputation of its goods and stand ready at all times to filch the demand it has created for them. If the conclusion of the Courts below is right, the appellant has no effective right to be protected against such infringers, because "the right of individual appropriation once lost is gone forever" (Saxlehner vs. Eisner, 179 U. S., 36).

This is true practically as well as legally. If this respondent may use appellant's trade-mark by adding some accessories, others may do likewise, with the inevitable result that something more than a representation of a star will be necessary to separate appellant's goods from others, whereby the practical value of its trade-mark is destroyed as certainly as its legal property right therein.

The important difference between cases relating to unfair competition and cases relating to technical trade-marks is well settled.

Lawrence Mfg. Co. vs. Tennessee Mfg. Co., 138 U. S., 537.

Elgin National Watch Co. vs. Illinois Watch Co., 179 U. S., 665.

In a case of unfair competition the law directs that the manner of use of what is *public juris* be fair ; in the case of a techinal trade-mark the law prevents the use by others of what is the exclusive property of one person. In the former the consequences of the defendant's acts require examination ; in the case of a technical trade-mark, " the fact of its use by another creates a cause of action " (179 U. S., 665, 677).

In Lawrence Man. Co. vs. Tenn. Man. Co., 138 U. S., 537–548, the Court say :

> " The jurisdiction to restrain the use of a trade-mark rests upon the ground of the plaintiff's PROPERTY in it, and of the defendant's unlawful use thereof (Boston Diatite Co. v. Florence Manufacturing Co., 114 Mass., 69). If THE ABSOLUTE RIGHT belonged to plaintiff, then, if an infringement were clearly shown, the fraudulent intent would be inferred, and, if allowed to be rebutted in exemption of damages, the further violation of THE RIGHT OF PROPERTY would nevertheless be restrained (McLean v. Fleming, 96 U. S., 245 ; Menendez v. Holt, 128 U. S., 514)."

The same fixed rule had been recognized without variation in all the cases which have come before this Court and directly applied in Menendez v. Holt, 128 U. S., 514.

In Elgin v. Illinois, 179 U. S., 665, the Court points out the essential differences between a case involving a technical trade-mark and a case of unfair competition saying in substance that in the case of a technical trade-mark " THE FACT OF ITS USE BY ANOTHER creates a cause of action," whereas in a case of unfair competition the mere use of the word will not be restrained but " THE USE OF THE WORD BY OTHERS IN SUCH A WAY AS TO AMOUNT TO A FRAUD on the public." Throughout its opinion the Court speaks of the right to a trade-mark as " an absolute right " (179 U. S., 684–677) and a trade-mark as something

which "can lawfully be withdrawn from common use" (p. 677). And the Court repeats the rule which we invoke:

> "If a plaintiff has THE ABSOLUTE RIGHT TO THE USE of a particular word or words as a trade-mark, then, if an infringement is shown, the wrongful or fraudulent intent is presumed, and, although allowed to be rebutted in exemption of damages, the further violation of the RIGHT OF PROPERTY will nevertheless be restrained."

Any number of illustrations of applications of the rule might be cited. For example the case of Enoch Morgan's Sons Co. v. Ward (152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729) was a case wherein the packages and accessories were as different as it would be possible with the display of the utmost ingenuity to formulate. One was a square cake in tin-foil with a blue band around it; the other a powder in a large cylindrical yellow package with red lettering. The Court of Appeals, reversing the Court below, which declined to grant relief because of the improbability of confusion, said:

> "Also, a manufacturer may put forth his goods in a distinctive or in a common dress and may rely upon building up a good-will by associating in the public mind his product with an invented word or symbol which he has the exclusive right of use. HIS RIGHT TO EXCLUDE, if a further analogy to the patent law may be drawn, IS LIKE THAT OF THE PRIMARY INVENTOR WHO PRODUCES A NEW INTERGER IN THE USEFUL ARTS. In such a case, a commercial pirate should not be permitted to escape the charge of infringement by putting a different dress on a competing article he is offering in association with the invented word or symbol. 'The jurisdiction to restrain the use of a trade-mark rests upon the ground of the plaintiff's property in it, and of the defendant's unlawful use thereof.' Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S., 537, 11 Sup. Ct. 396, 34 L. Ed.,

> 997. If a word or symbol is of a character to be appropriated, and if it has been duly appropriated as a trade-mark, *it becomes property; and* A COMPETITOR'S USE THEREOF, EITHER ALONE OR IN CONNECTION WITH MATTER TO WHICH ITS OWNER LAYS NO CLAIM, WITHOUT THE OWNER'S CONSENT, CANNOT BE LAWFUL" (p. 692).

In this connection the case of Liggett & Meyers Tobacco Co. v. Finzer, 128 U. S. 182, should be mentioned. In that case the complainant alleged that it was the first to adopt and and use a star as a trade-mark for tobacco and sought to restrain the use of a different star by the defendant, The first point which the Court considered was whether the representation of a star was the mark which distinguished the complainant's goods from others. It said :

> " Upon the first of these two points the testimony establishes the fact that the complainant was the first person to use a star made of tin and fastened upon plug tobacco, as described above, but that *he was not the first person to use the design of a star* upon plug tobacco. The priority of use, therefore, by the complainant extended *only to the tin star* and *not to the design of a star* generally" (128 U. S., 183-4).

The Court having thus found that the complainant's property right was limited to a particular kind of a star and did not extend to "a star generally" and finding that the defendant used a different kind of a star and so was not trespassing upon the property right, considered the question as to the probability of confusion. The obvious implication is that had it found that the complainant's priority of use extended to " the design of a star generally" the defendant would have been enjoined as of course. In the case at bar there can be no question concerning appellant's right to a star generally.

The same rule which is essential to the fulfillment of the purposes of the law prevails in England, where it was recently

said by the Court of Appeals in Faulder & Co. v. Rushton, Ltd., 20 R. P. C., 477–495:

> "I am, I hope, fully alive to the distinction between an action founded on a trade-mark and an action founded not on property but on a passing-off of goods. The relief given in one case differs from the relief given in the other. If 'Silver Pan' were a registered trade-mark the defendants would be restrained from using it *even if nobody had ever been deceived by it or ever could be deceived by it.*"

This well-settled rule implies that the use of other things in connection with the mark is immaterial. The use of another's property cannot be justified by showing that there has also been a use of things not his property. (Bass etc. Co. v. Feigenspan, 96 Fed. 206). It is not, we think, proper in a case of this kind to speculate in any way concerning consequences. The fact of use is alone important. But it may be said that, because it impairs the individuality and recognizability of the mark, the use of it by others with attachments or accessories is apt to work eventually more serious injury than a robust counterfeit—in the same way that the destruction of the value of any other property is more serious than the pilfering of some of the returns it yields.

To apply this rule to the case at bar is to decide that, whatever may be true of the ordinary representation of a comet which includes no star or the word "comet" the use of the respondent's "exaggerated point" is unlawful, not because one may or may not conjecture that it may deceive the public, but precisely because it is an unauthorized appropriation and destruction of appellant's property.

The fact that some of the forms of infringement appear in advertisements and letter-heads is not important because the use of another's trade-mark in advertising is as inimicable to the preservation of his rights and

business and as illegal as its use on the article itself. As lucidly stated in Jay v. Ladler, 6 R. P. C., 136–139:

> "A man is not entitled—whether in trade or out of trade—to take that which is another man's, and when a man in trade advertises his goods as being the goods of another person, he is doing that which is wrong in itself, and liable to injunction in this court. * * *
>
> "He is not entitled to do that: If he does it, he is liable to be restrained, and if he does that in any way, whether by saying it in so many words, or by advertising what is known as the mark or symbol of his rival—however he does it—he is still liable to be restrained, and the court is not, and never has been, and I hope, never will be, astute to find differences which will allow a man to evade the general law" (p. 56).
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> Walter Baker & Co. v. Slack, 130 Fed., 514–519; 65 C. C. A., 138.

This, like the rule that a technical trade-mark is the property of its owner, is recognized in the Trade-mark Act, which condemns adverse use in "signs * * * intended to be used * * * in connection with the sale of merchandise of substantially the same descriptive properties."

In the present instance the respondent is using his "exaggerated point" in his advertisements branded distinctly "trade-mark" (p. 95). There is no question of use as a decoration. It is a case of direct appropriation and use of "that which is another man's."

The respondent is in fact using and destroying a property of the utmost value belonging to the appellant. He ought to be restrained from doing just that; and that is all the injunction prayed restrains.

The accounting would not be worth the time it would consume and may be taken as waived.

We respectfully submit that the decree should be reversed with directions to enter a decree for an injunction as prayed in the bill of complaint.

The Right of Appeal to this Court.

In view of the fact that (so far as we know) this is the first appeal based on the fact that the jurisdiction of the Circuit Court was founded on that particular law of the United States approved February 20, 1905, a few words should, perhaps, be added as to this appeal.

The right of the appellant to this appeal depends upon the Judiciary Act of March 3d, 1891, c. 517, 26 Stat. 826, and the Trade-Mark Act of February 20, 1905, 33 U. S. Statutes at Large, part 1, p. 724; U. S. Compiled Statutes Supplement of 1907, p. 1008.

The Judiciary Act of March 3d, 1891, provides "for the distribution of the entire Appellate jurisdiction of our national judiciary system" (McLish v. Roff, 141 U. S. 661; Macfadden v. United States, 213 U. S. 288). The Act and the decisions of this Court interpreting it seem to make plain that an appeal lies from the Court of Appeals to this Court in all cases except those wherein an appeal lies to this Court direct from the Court of first instance and those wherein the decision of the Court of Appeals is expressly made final. That right of appeal is not to be defeated by implication but exists unless the decision of the Court of Appeals is "made final in terms" (144 U. S., 57).

Press Publishing Co. v. Monroe, 164 U. S. 105;
Werner v. Searle Hereth Co., 191 U. S. 195, 205;
Lau Ow Bew v. United States, 144 U. S. 47.

The Judiciary Act of March 3d, 1891, applies equally to laws of the United States enacted before and after March 3d, 1891.

Spreckles Sugar Refining Co. v. McClain, 192 U. S., 397.
Lau Ow Bew v. United States, *supra*.

Under the Judiciary Act the Court of Appeals had appellate jurisdiction in the case at bar and an appeal could be taken to this Court, because the jurisdiction of the Circuit Court rested on a law of the United States and the case was accordingly not a case in which the judgment of the Court of Appeals is "made final in terms" (144 U. S. 57), but a case "not expressly made final by the section" *(ib.)*.

The Trade-Mark Act of 1905 is in no way inconsistent with the Judiciary Act of 1891 and does not make the decision of the Court of Appeals final. The provision as to the jurisdiction of Courts in the Trade-Mark Act was enacted following the Judiciary Act which contained words "manifestly inserted out of abundant caution in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away, except when expressly so provided. Implied repeals were intended to be thereby guarded against" (Lau Ow Bew v. U. S., 144 U. S. 56).

With this before it Congress carefully avoided making the decision of the Court of Appeals final in Trade-mark cases, as will be seen by comparing the words of the Judiciary Act and the Trade-Mark Act. The Judiciary Act of 1891 uses the words:

> "That the Circuit Court of Appeals * * * shall exercise appellate jurisdiction * * * and the judgments or decrees of the Circuit Courts of Appeal shall be final in * * *"

The Trade-mark Act provides that the Circuit and Territorial Courts shall have jurisdiction and the Circuit Court of Appeals

> "shall have appellate jurisdiction in all suits at law or in equity regarding trade-marks registered under this Act."

There is nothing inconsistent. There is nothing making the decision of the Circuit Court of Appeals final. And it would seem that Congress took pains to leave the right of appeal to this court untouched.

The Trade-mark Act of 1905 also provides in Section 18 that writs of *certiorari* may be granted by this court "for the review of cases arising under this Act in the same manner as provided for patent cases by the court creating the Circuit Court of Appeals." This is not inconsistent with the right of appeal and is not unnecessary. The right of appeal to this court is limited by the Judiciary Act to causes in which the amount involved exceeds one thousand dollars. The provision for *certiorari* in cases under the trade-mark law applies regardless of the amount of the controversy.

Thus the Judiciary Act and the Trade-mark Act together arrange matters so that in cases involving less than one thousand dollars (and perhaps before final decision in other cases) a petition for *certiorari* is the proper course and in cases involving more than one thousand dollars an appeal may be taken as of right from the decision of the Court of Appeals, because the jurisdiction of the Circuit Court rests upon a law of the United States and the decision of the Court of Appeals is not made final.

That the amount involved in the present case exceeds one thousand dollars is deducible from the record, but to avoid the necessity of considering that the appellant respectfully files an affidavit to that effect, following the practice approved in

Course *et al.* vs. Stead *et Ux.*, 4 Dallas, 22 (1 Curtis 319).
The Gracc Girdler, 6 Wall., 441.
Parker vs. Morrill, 106 U. S., 1.
Johnson vs. Wilkins, 116 U. S., 392.
Wilson vs. Blair, 119 U. S., 387.
Glacier, etc. Co. vs. Willis, 127 U. S., 471.

The decision below ought to be reversed with instructions to enter a decree for an injunction restraining the use by the respondent of appellant's trade-mark.

Respectfully submitted,

ARCHIBALD COX,
Counsel for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 182.

HUTCHINSON, PIERCE & COMPANY,
Appellant,
vs.
JOSEPH LOEWY.
} No. 237.

APPELLEE'S BRIEF.

The suit here on appeal is admittedly brought under the act of Congress approved February 20, 1905, affecting trade-marks as appears by the petition for appeal to this Court upon page 93 of the transcript of record.

Such being the case the suit is, of course, governed by the statute which at sections 17 and 18 reads as follows:

> "Sec. 17. That the circuit and territorial courts of the United States and the supreme court of the District of Columbia shall have original jurisdiction, and the circuit courts of appeal of the United States and the court of appeals of the District of Columbia shall have appellate jurisdiction of all suits at law or in equity respecting trade-marks registered in accordance with the provisions of this act, arising under the present act, without regard to the amount in controversy.
>
> "Sec. 18. That writs of certiorari may be granted by the Supreme Court of the United

> States for the review of cases arising under this act in the same manner as provided for patent cases by the act creating the circuit court of appeals."

Section 17, which places the appellate jurisdiction in the courts of appeal does not specifically prohibit appeals from the Court of Appeals to this court, but Section 18 provides for review by this Court of the action of the courts of appeal by certiorari "as provided for patent cases by the act creating a circuit court of appeals."

It is believed that the provision just quoted from Sec. 18 is such as to make the court of appeals final and that under such statute no appeal is allowed to this court. The contention, therefore, is that the present appeal is in this court without authority of law and should be summarily dismissed without hearing upon the merits. It is not deemed necessary to quote from the act of Congress of March 3, 1891, as amended February 19, 1907, establishing the Court of Appeals with final jurisdiction in patent cases. It is believed that the trade-mark act above quoted from, places suits brought under such trade-mark act plainly within the scope of the act establishing the Court of Appeals and that in view of such several acts of Congress matters heard relative to trade-marks in the Court of Appeals can be reviewed in this court only upon certiorari unless this court sees fit to depart from its present practice in the matter.

In view of the possibility, however, that the court may retain jurisdiction and consider the appeal on its merits it is deemed advisable to enter into a discussion of the merits of the case.

The action was brought by the plaintiff both for infringement of trade-mark, as appears by folios 3 to 7 of the transcript of record, and for unfair competition, as appears by folios 8 to 10 of such transcript. It was also

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an action for profits of the defendant and damages of the plaintiff as well as for injunction.

The plaintiff has not introduced any testimony to show that its business or trade has in any way been interfered with by any sales made lawfully or unlawfully by the defendant, nor has any testimony been introduced to show that defendant has sold any goods whatever in competition with the goods of plaintiff either with or without the mark of plaintiff. Such being the case the allegation of unfair competition and the action for profits from the defendant and damages of the plaintiff must of necessity fall. To substantiate a claim of unfair competition it is of course necessary to prove competing sales, and without such proof the action is reduced to a simple action for infringement of trade-mark. Even in cases brought for infringement of trade-mark, proof of confusion by reason of the use of such mark is necessary unless the marks are identical or so nearly identical as to leave no doubt in the mind of the court as to the similarity or the probability of conflict and confusion.

The decision of the Court of Appeals of the Second Circuit from which this appeal is taken is to the effect that in view of the parties to the suit being residents of the same State, to wit, New York, they could consider only the question of infringement of trade-mark as provided in the act of February 20, 1905, giving the Federal courts jurisdiction over trade-mark matters and could not consider the question of unfair competition at common law as they had no jurisdiction of the parties for that purpose.

It is not thought necessary to cite any authorities on this question as the testimony of the parties clearly shows that there is no diversity of citizenship consequently the Federal courts can acquire only such jurisdiction as is

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specifically conferred upon the courts by statute and as the jurisdiction of unfair competition has never been so conferred the courts can have no jurisdiction of such subject matter.

The present appeal is taken on the theory that the plaintiff is entitled to the exclusive use of a star no matter in what connection it is found, or coupled with what accessories, and a number of decisions were cited by plaintiff's counsel before both the lower courts to substantiate that contention. The decisions cited by plaintiff, in which it or its predecessors were parties, have invariably accorded to plaintiff or its predecessors the exclusive use of the mark "Star" as a trade-mark for shirts, and in some of the cases cited have gone so far as to enjoin the use of stars in association with other features. The contention, however, that they are entitled to the exclusive use of a star, no matter in what connection or association it is used, is thought to be met in the following illustration:

The above cut shows a star, and it is believed that the star is fully as much in evidence as the star in Loewy's trade-mark seen hereinafter. As a further illustration of the use of a star the following cut is also submitted for inspection:

Again a star is shown, but in both of the cuts above the star is shown with other features and accessories, and with names applied thereto clearly differentiating and further clearly indicating that there is no claim of the word "Star," either as spelled by its letters or as used by the public by reason of a star being illustrated. No contention is made that plaintiff is not entitled to the exclusive use of a **star** as a trade-mark for shirts or to prevent the use of a star for like goods, provided it is such a star as is liable to confuse the public or to lead purchasers to believe that they are securing

the goods of plaintiff when they are in fact buying the goods of another. No contention is made either, that in case the marks are so similar as to cause confusion, defendant might not be estopped from using his trademark even though no proof was brought as to actual confusion. It has been held that these marks are not so similar as to be likely to cause confusion by tribunals other than the courts below in this case. A cancellation proceeding was begun in the United States Patent Office by Hutchinson, Pierce & Co., the appellant herein, to cancel the registration of Loewy, the defendant herein, for the comet, which forms the contention in the present appeal and the decision of the Examiner of Interferences was to the effect that there was no such similarity as was likely to cause confusion, nor evidence of confusion, and the petition for cancellation was dismissed. Appeal was taken to the Commissioner in person and was heard by the Assistant Commissioner. The Assistant Commissioner affirmed the Exeminer of Interferences and his opinion will be cited later herein.

In Delaware & Hudson Canal Co. v. Clark, 13 Wall., 311 (L. Ed., 518), this court said:

> "In all cases where rights to exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appeals to a Court of Equity can have relief. This is the doctrine of all authorities."

In Paul on Trade-Marks, Section 24, we find the rule laid down as follows:

> "As in cases of trade-mark, so in cases of unfair

competition in business, imposition upon the public is a necessary constituent of the plaintiff's title to sue, but only in the fact that it is the test of the invasion of the plaintiff's rights by the defendant. As in one, so in the other, the object and purpose of the law is, first, to secure to him who has been instrumental in bringing into market a superior article of merchandise the fruit of his industry and skill, and, secondly, to protect the community from imposition. As in one, so in the other, the underlying principle is that one man is not to sell his goods under pretense that they are the goods of another; and, as in one, so in the other, the violator of another's rights pirates upon the good will of that other's friends and customers, or the patrons of his trade and business, by sailing under his flag without his authority or consent. There is this difference, however, the law of trade-marks is designed to protect primarily a property right, and, as incidental thereto, gives redress for the injuries resulting from invasions of that right, a distinct, technical trade-mark being in itself evidence when wrongfully used, of an illegal act, while the jurisdiction exercised over cases of unfair competition in business is grounded in the prevention of fraud. Fraudulent intention is not a necessary ingredient of a pure trade-mark case, as an invasion of another's trade-mark may be the result of accident or of a misunderstanding, although it may be and probably is true that in the majority of cases fraud is an element of trade-mark cases in awarding damages and costs."

The test referred to in the above quotation is such as is employed in trade-mark cases, as distinguished from cases of unfair competition, and the proof of confusion is not for the purpose of proving damages, but simply as a test, as stated by the author, to convince the court

that infringement exists, which may not be determinable by a simple inspection of the marks. In the present instance, however, the test required, to wit, **the proof of confusion has been entirely omitted** and the two marks are of necessity submitted to the court for inspection, the testimony amounting practically to nothing but proof of the use of the two marks by the parties which has not been denied by defendant.

In the plaintiff's record the testimony of Joseph Loewy on behalf of the plaintiff is found, and being a witness for the plaintiff the plaintiff is, of course, bound by such testimony, although the witness is in fact the defendant. At folio 42 of the transcript of record is found the following:

> "X-Q. 91. Did you ever apply the word 'Star' to any shirts made by you? A. Never did. Never had any reasons. At folio 43, X-Q. 112. Did you always use the word 'Comet' in connection with the representation of a comet on shirts made and sold by you? A. Yes, sir. At folio 44, X-Q. 114. Did you ever use the word 'Star' or representation of a star on a shirt made and sold by you? A. Never did."

Plaintiff seeks to establish the fact that defendant has used the trade-mark "Star" on shirts manufactured by him, but its own witness, Joseph Loewy, denies that such had ever been the case, and that in addition to employing the symbol of a comet upon the goods the defendant has invariably also employed the word "Comet."

In the testimony introduced on behalf of defendant appears the deposition of William J. Wilkinson, who is a buyer for the department store of John McCormick, of Brooklyn, and to the effect that shirts bearing the regis-

tered trade-mark of the plaintiff, No. 51,146, and other shirts bearing the registered trade-mark of defendant, No. 56,102, and the subject of this cause are sold at the establishment of John McCormick, and that there has never been any confusion or misrepresentation practiced on the public, and to his knowledge no shirts have ever been purchased at that establishment bearing the mark of the defendant, believing them to be the manufacture of the party complainant. This testimony is the only testimony introduced positively to the effect that shirts bearing the two marks are sold from the same establishment and without confusion, but as it is unrebutted it must stand as the only testimony on the subject and is directly opposed to actual confusion.

In McLean v. Fleming, 6 Otto, 245, 24 Law Ed., 832, this court says:

> "Colorable imitation which requires careful inspection to distinguish the spurious trade-mark from the genuine is sufficient to maintain the issue; but a court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. When the similarity is sufficient to convey a false impression to the public mind and is of a character to misrepresent and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress if he has been guilty of no laches."

Quoting with approval Manufacturing Co. v. Spear, 2 Sandf., 599, Coddington Dig., 109; McAndrew v. Bassett, 4 DeG. J. & S., 380.

In Kann et al, v. Diamond Steel Co. et al., 89 Fed. Rep., 706, The trade-marks in question consisted in one

case of the outlined form of a diamond or lozenge in connection with the words "Crushed Steel," and in the other case consisted of a "radiant diamond" combined with the words "Diamond Steel No. 1." In disposing of the case Judge Sanborn presented the opinion of the Court, as follows:

> "**Every suit of this character is founded on the fact that the action, or the proposed action, of the defendant has deceived, or is calculated to deceive, ordinary purchasers buying with usual care, so that they have purchased, or will probably purchase, the goods of the defendant under the mistaken belief that they are those of the complainant, to the serious damage of the latter.** The deceit, or probable deceit of the ordinary purchaser to such an extent that he buys, or will probably buy, the property of one manufacturer or vendor in the belief that they are those of another, is a *sine qua none* of the maintenance of such a suit, because every one has the undoubted right to sell his own goods, or goods of his own manufacture, as such, however, much such sales may diminish or injure the business of his competitors. * * * At present it is sufficient to say that in all cases where a trademark is imitated, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and it is only when this false representation is directly or indirectly made, and only to the extent to which it is made, that the party who appeals to the justice of the court can have a title to relief. * * *
>
> "The burden was on the appellant to show that the use of the symbol and words which marked the German product were calculated to deceive ordinary purchasers and to create confusion in the trade. It was open to it to do this by evidence

that the use had actually done so, or by the ocular demonstration of a comparison of the symbols and words which marked the packages in which the two products were offered for sale. It produced no proof of actual deception and thus left the question whether or not the dress in which the German product is clothed is calculated to deceive the ordinary purchaser, to the arbitrament of the eyes. When they are turned upon the two trade-marks, either simultaneously or successively, the general impression is one of difference and dissimilarity. It is true that the one bears a diamond-shaped figure, and the other the picture of a radiant diamond, but, to the eyes, these present little likeness. It is not by the visual perception, but only through the mental suggestion, that both pictures represent a diamond, and that things which are equal to another are equal to each other, that the hint of likeness is reached, and this is the only suggestion of similarity the two trade-marks contain. It is at least doubtful whether the thought that the two devices represent a diamond, and that therefore, they must represent the product of the same manufacturer, would ever occur to the ordinary purchaser in the busy marts of trade. He probably recognizes the goods he seeks to buy by the visual impression of the device upon the product, rather than by the name of the thing whose picture is impressed. The pregnant fact that the appellant sold its goods marked with its diamond-shaped figure for more than five years before the German product was introduced, and yet neither the appellant nor any of its customers called it 'Diamond Steel,' or used the word 'Diamond' in connection with its sale, lends strong support to this probability. * * * If, through the use of the symbol [here follows sketch of diamond-shaped figure], the abradant manufactured by the appellant had become known to the

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> trade as 'Diamond Steel,' 'Rhombus Steel,' or 'Lozenge Steel,' no court would hesitate to restrain a defendant from using any word or device which would cause the article he offered to be called by the same name as the appellant's because such an act would tend to deceive purchasers, and to create confusion in the trade. * * * The use of the word 'Diamond,' and the picture of a radiant diamond, had no element of deception in it, and therefore furnished no ground for the relief sought by the bill. * * * Whatever may have been the intention of Robert J. Marx and the appellees in adopting and using their trade-mark, it does not sufficiently resemble that of the appellant to mislead purchasers or to convey a false impression to the public. **There is no evidence in the record that the appellant has ever suffered any injury from any deception caused by it, and there is no probability that it ever will.** Such a case presents no ground for relief, either at law or in equity."

In the Liggett & Myers Tobacco Co. v. Rudolph Finzer, 128 U. S., 182 (L. Ed. 396), the subject in controversy is stated in the quotation here given, together with the holding of the court in that relation:

> "Upon the second of the two points there is even less ground to sustain the position of the complainant. The two stars, the one used by the plaintiff and the one by the defendant, are so different in form and surroundings that it would not be possible for any person not afflicted with color blindness to mistake the one for the other. They differ in size and color. The star used by the complainant on its manufactured goods is a little over one-half inch in diameter with a hole in the center. The mark used by the defendant consists

of a round paper label over three-fourths of an inch in diameter with a red star and the word 'Trade' on one side and the word 'Mark' on the other in gilded letters on a red background and having beneath the star the word 'Light,' thus forming by the figure and the letters the word 'Starlight.' One star has the silvery appearance of tin foil, the other has a glare of red and yellow-gilded background. The judgment of the eye upon the two is more satisfactory than evidence from any other source as to the possibility of parties being misled so as to have one mistaken for the other; and this judgment is against any such possibility. Seeing in such case is believing; existing differences being at once perceived and remaining in the mind of the observer. **There is no evidence that anyone was misled by the alleged resemblance between the two designs."**

As in the case just above quoted, so in the case under consideration; there is a great difference in the size of the two marks, as shown in the illustrations, photolithographic copies of which are appended hereto. In the marks as registered, the greatest dimension of the head of defendant's comet is practically seven-sixteenths of an inch, while the greatest dimension of the plaintiff's **star** is one and one-fourth inches.

There has been introduced in the evidence no sample or exhibit showing the mark used by defendant and forming the subject of this proceeding, but the head of the defendant's **comet,** as actually used upon the goods is five-sixteenths of an inch in greatest dimension, while the **star** employed by plaintiff upon its goods measures three-fourths of an inch in greatest dimension. The head of defendant's **comet** exhibits five points and is a solid body, while the **star** employed by plaintiff

exhibits six points and is simply an outline of a **star,** as would be produced by superposing one triangle upon another. The head of defendant's **comet** is also accompanied by a tail shown in the registration as one and one-half inches long, the mark as registered being larger than the mark as ordinarily employed upon the goods.

Plaintiff introduced into evidence a shirt and attempted to prove that the shirt so introduced was manufactured by the defendant. The shirt mentioned was introduced in the testimony of F. W. Stearns, and the offer appears on page 18, folios 27 and 28 of transcript of record, while on page 63 appears an alleged reproduction of the mark upon such exhibit.

It will be noted from an examination of the record, page 1, that the present suit was begun on May 14, 1906, and the shirt introduced in evidence was purchased by the witness, F. W. Stearns, on June 28, 1906, Qs. 26-28, page 18 of transcript of record. This shirt was, therefore, purchased approximately six weeks after the beginning of the action, and any attempt to hold defendant for an infringement committed after the commencement for the suit is, of course, simply laughable.

Furthermore, the testimony of Stearns, Q. 29, page 8, as to the occurrence at the time of purchase of the shirt shows conclusively that upon one occasion at least the **comet** goods were **not** sold as **star** goods as the testimony of the witness as to such occurrence is to the effect that "the girl hesitated and said she didn't know that she had a 'star shirt.' I said, you have got a shirt hanging in the window with a star on it. Oh, yes, she said, we can sell you one of those," which shows conclusively that the "Comet" shirts were not sold as "Star" shirts but that they would sell "one of those in the window."

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In the testimony of Loewy, produced on behalf of plaintiff, an attempt was made to prove the exhibit, Complainant's Exhibit Defendant's Shirt, just referred to, as one manufactured by the defendant, but such attempt absolutely failed as the witness positively refused to identify the shirt as of the manufacture of the defendant stating, however, that both the shirt and mark were similar to the mark employed and shirt manufactured by defendant.

There was also an attempt made to introduce into the evidence of plaintiff, an advertisement said to have been clipped from the "Haberdasher," but **no trade mark was introduced as actually used upon the goods.** That the Honorable Court may have properly before it the mark as employed by the defendant **we have attached two of the marks as actually employed upon the goods by the defendant,** one showing the mark woven in red; the other showing the mark stamped upon the label in black, as follows:

The complainant introduced into its testimony an exhibit showing its **star** as actually used upon the goods so the court by reference to the above samples will have opportunity to compare the trade-mark as employed by defendant with the trade-mark as actually employed by complainant.

Introduced into the testimony of the complainant was also a box label showing the employment of their **star,**

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and so that the court may have also before it the box label employed by defendant, one of the said labels is appended hereto, appearing at the back of this brief. It is contended that the two marks in controversy in this case are far more dissimilar than were the **two stars** in controversy in the case of Leggett et al. v. Fenzer *supra*.

The labels of defendant are inserted here not for the purpose of bolstering up the testimony of the complainant (in not introducing such labels as actually used upon the goods), but to place fully and fairly before the court the marks of defendant, in the use of which he has nothing to conceal.

In the Court of Appeals for the second circuit in N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 77 Fed. Rep., 869, the controversy arose over the well known "Gold Dust" package and a package of soap powder put up by R. W. Bell Co. called "Buffalo Soap Powder" in packages of similar size and general appearance, but in that case the court held that the dissimilarity was so marked that the public would not be likely to be deceived and held that there was no infringement.

Indeed, at circuit it has been held in Galena-Signal Oil Co. v. W. P. Fuller & Co., 142 Fed. Rep., 1002, that a representation of a star cannot by its own meaning indicate the origin or ownership of such an article as lubricating oil, nor in view of its general use as a symbol can it be appropriated as a trade-mark except in connection with other devices or words such as to render the whole characteristic; and in this case the Court said:

> **"It does not appear from the affidavits in support of the complaint that the defendant has sold or placed upon the market any of its product as and for the product of the complain-**

ant. No one appears to have been deceived by the defendant's trade-mark into purchasing its lubricating oils in the belief that he was purchasing lubricating oils produced by the complainants. **It is not alleged, and no fact is stated justifying the inference, that there has been any false or deceitful representations or unfair dealing on the part of the defendant, or that it has had any fraudulent intent in the use of its trade-mark in the identification of its own goods. There is, therefore, lacking in this case the element of unfair competition in trade which is generally the essence of the wrong that brings the complainant into a court of equity for relief against the infringement of a trade-mark.** * * * The action is limited to the charge that the defendant has infringed a technical trade-mark in violation of a right of property wherein the fraudulent intent is presumed. The object of the suit is to restrain a further violation of the alleged right of property. * * *

"This issue makes it necessary to consider the nature of a trade-mark. What is it? It has been determined that to acquire the right to the exclusive use of a name, device or symbol as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctly, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. Columbia Mill Co. v. Alcorn, 150 U. S., 460, 463; 14 Sup. Ct., 151; 37 L. Ed., 1144. It is manifest that the symbol or representation of a star cannot by its own mean-

ing indicate the origin or ownership of such an article as oil. It can only then be by association that its origin or ownership can be so indicated. **But the representation of a star is a familiar symbol, and can be found in every character of business and associated with all kinds of products and goods. Standing alone, it is not sufficiently distinctive to answer the requirements of a trade-mark, for the reason that it has been adopted by many manufacturers and producers for all kinds of articles. It can be found all through the Patent Office Gazette, but always in connection with some other mark or device to indicate origin or ownership.** The symbol or device which one is at liberty to affix to a product of his own manufacture as a trade-mark must be one not previously appropriated, and which will distinguish the article from one of the same general nature manufactured or sold by others. * * *

"The evidence introduced before the Commissioner of Patents in the interference case shows that this particular trade-mark was not used on the packages of oil sent out by the complainant or its predecessors before December, 1899. The evidence on the part of the defendant shows that the six-pointed star, with the words, 'Extra Star' above, had been in use by the defendant and its predecessors since 1878, or for more than 20 years prior to the time complainant used the same trade-mark on its goods. The trade-mark used by the complainant on its goods prior to 1899 was the five-pointed star, with the words 'Galena' above and 'Oil' below and the letter 'G' in the center. This trade-mark the Commissioner of Patents held was substantially the same as defendant's six-pointed star, with the words 'Extra Star' above. In this view, as before stated, I do not concur. But I hold that defendant's six-pointed star, with the words 'Extra Star' above, is not

> calculated to induce any one buying defendant's goods into the belief that such person is buying complainant's goods with the trade-mark of the five-pointed star, with the words 'Galena' above and 'Oil' below, and the letter 'G' in the center. In support of this view, it is somewhat significant that these two trade-marks were not brought into conflict until 1902. The partial explanation is that complainant was selling its lubricating oils in the Eastern States and exporting them to Europe, while the defendant was selling its lubricating oils in the Western States and exporting them to the Hawaiian Islands and Australia. It further appears that the complainant and its predecessors have been selling its lubricating oils to large railroad companies, who doubtless bought the oil because it was produced by the complainant and its predecessors, who had achieved a reputation for producing a high character of oil under the name and brand of 'Galena Oil,' and not under any trade-mark. This fact I think sufficiently appears from the pamphlet introduced in evidence concerning complainant's 'Galena Oils,' where no reference is made to any trade-mark under which complainant's product is sold."

It will thus be seen that in the opinion of Judge Morrow a **star** per se is not a technical trade-mark, or a mark in which one **may** acquire trade-mark rights. This, however has been adjudicated, so far as the mark of the complainant is concerned, in the decisions cited in the affidavit of George S. Brown, namely, Hutchinson et al. v. Covert, 51 Fed. Rep., 832, and Morrison et al. v. Case et al., 9 Blatchf., 549 Federal Cases 9845, in which several Federal courts have held that the star employed by complainant is a technical trade-mark, and that they have trade-mark rights therein, so that the decision in the

Galena Oil case, *supra,* does not have any bearing on the present controversy except to indicate the measure of differences which should exist between marks, so that one is not an infringement on the other.

It will be seen that in the Galena case the employment of one star with a big "G" enclosed therein was not infringed by the employment of a star associated with the words "Extra Star." The case at issue presents marks much more dissimilar than the marks considered in the Galena Oil Case, in that one of the marks registered is an "open work" star, accompanied by the word "Star," while the other mark is clearly a comet, and also accompanied by the word "Comet," the head of the comet being entirely dissimilar from the star in the other mark.

Granting, as decided by the several courts above quoted, that the star of complainant is a valid trade-mark, it is contended in the light of the Galena Oil case that any other star differing from it in shape, make up, or accompanying words, would not infringe the open work star of complainant, and much less is there an infringement of such star by a comet, the major portion of which is a tail, and also accompanied by the word "Comet."

In the several cases above cited wherein the complainant was a party complainant, the controversy was in relation to marks very dissimilar from the mark of defendant. In Morrison et al. v. Case, *supra,* the Court said: By use, the word "star" has become a good trade-mark, and defendant use **"the words and device of complainant both in the exact form and in such near resemblance as is calculated to deceive."**

In Hutchinson et al. v. Blumberg the defendant employed a star and crescent, with the star the more noticeable because, as the Court says "he makes the star so

prominent a feature in the mark as to enable him or those dealing in his goods to impose them upon the inexperienced and unwary as "Star Goods."

In Hutchinson v. Covert the defendant employed a single star with the words "Lone Star," and the Court held that such was an infringement.

In the case under consideration defendant does not employ a star, although the head of the comet, if taken alone and not in connection with the tail and word, would, of course, be considered a star. The head and tail of defendant **comet** are one single figure, and even without the word "comet" could not for a moment be considered a **star,** and when accompanied by the word "comet" all similarity is eliminated and the mark is surely relieved from any possibility of infringement on the **star** of Hutchinson, Pierce & Co., especially in view of the fact that **no evidence has been introduced to show, or attempt to show, any confusion.**

The plaintiff has argued in this case, as it also argued in the cancellation proceeding before the Commissioner of Patents herein mentioned, that defendant might without infringement use a conventional comet as a trademark which would not embody a star, but would represent a nebulous head or, as applied to drawings, a head of stipple work, stating that the mark as employed by defendant does not in fact represent a comet. It is not seen that it is necessary to dispute the position taken by complainant that the mark of defendant does not accurately represent a comet. It may be true as stated in the argument that a comet is in fact a nebulous body with a tail, but as far as correct representation of astronomical bodies is concerned it is believed that the mark of defendant represents a comet as faithfully as the mark of complainant represents a star.

It is not believed that the accuracy of representing heavenly bodies by the marks of the parties is one of any importance in this case as so far as trade-mark rights are concerned the defendant might have used the donkey or the scepter hereinbefore shown and called either one a comet; and been fully within his rights, as fully as the complainant is within its rights by using the representation it employs and calling it a star. Whether the marks are or are not correct representation of any heavenly or other bodies does not seem to be the point at issue; the point seems to be whether or not the mark of defendant so nearly resembles complainant's mark that the Court may take judicial knowledge of the fact that it is likely to cause confusion without any testimony being introduced to show actual confusion to have existed.

Since the beginning of the present action, a proceeding was begun in the United States Patent Office by this complainant for cancellation of the trade-mark No. 56,-102, registered by defendant, and the grounds alleged for such cancellation were in all respects similar, and the testimony introduced in support of such petition substantially the same as the facts and testimony relied upon in the present proceeding.

The matter was ably presented before the Examiner of Interferences and a printed brief filed, in which the present complainant cited the following authorities in support of their contention with numerous citations from many of them:

Bass & Co. v. Feigenspan, 96 Fed. Rep., 206, 212.
Enoch Morgan's Sons Co. v. Ward, 152 Fed. Rep., 692.
Johnson & Johnson v. Bauer & Black, 82 Fed., 662.

Fairbanks Co. v. Luckel, etc. Co., 102 Fed., 331.
Menendez v. Holt, 128 U. S., 514.
N. K. Fairbank Co. v. Central Land Co., 64 Fed., 134.
Royal Baking Powder Co. v. Raymond, 85 Fed., 231.
Enoch Morgan's Sons Co. v. Wendover, 43 Ib., 420.
Gannett v. Rupert, 127 Fed., 963.
Shaver v. Heller & Merz Co., 108 Fed., 821.
Thompson v. Montgomery, 41 Ch. D., 35; 138 U. S., 550.
Anheuser-Bush Brewing Asso. v. Piza, 24 Fed., 149.
Colgate v. Adams, 88 Fed., 899.
Clark Thread Co. v. Armitage, 74 Fed., 936.
City of Carlsbad v. Kutnow, 71 Fed., 168.
Fuller v. Huff, 104 Fed., 141.
Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S., 537-548.
Columbia Mill Co. v. June Mfg. Co., 163 U. S., 169, 193.
Brown Chemical Co. v. Meyer, 139 U. S., 540.
Saxlehner v. Eisner & Mendelsohn, 179 U. S., 19.
Columbia Mill Co. v. Alcorn, 150 U. S., 460, 464.
Gannett v. Rupert, 127 Fed., p. 964.
Lawrence Mfg. v. Tenn. Mfg. Co., 138 U. S., 537-548.
McLean v. Fleming, 96 U. S., 245; Menendez v. Holt, 128 U. S., 514.
Faulder & Co. v. Rushton, Ltd., 20 R. P. C., 477, 495.

After full and due consideration by the Examiner of Interferences of the cancellation proceeding a decision was rendered, dated October 21, 1907, as follows:

> This is an application by Hutchinson, Pierce & Company to cancel the certificate of registra-

tion of Joseph Loewy, dated August 21, 1906, No. 56,102.

The first ground for cancellation alleges that "Loewy was not entitled to the use of the mark at the date of his application for registration thereof." The two remaining grounds set forth facts upon which the conclusion, constituting the first ground, is based.

The testimony of Brown and McKiernan establishes that the registered mark of applicant (Exhibit No. 5) has been continuously used on shirts sold by this company from at least as early as 1869.

The mark shown in Exhibit No. 5 consists of the representation of a six pointed star and the word "Star" placed therebelow. It appears that the goods made by the applicant's company are known in the trade as "Star" goods.

The testimony of Loewy (Qs. 3-7) is believed to be sufficient to establish that the mrak shown in his certificate of registration, No. 56,102, has been continuously used on shirts sold by his company since 1872. As this date is subsequent to 1869, the date established by applicant for adoption and use of its mark, and as the class of goods to which they have been affixed is the same, if the mark of registrant so nearly resembles the mark of applicant as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers, the registrant was not entitled to the use of the mark in question at the date of his application for registration, and his certificate of registration should be canceled.

In the certificate No. 56,102 are shown a five-pointed star and a tail or streamer joined thereto to represent a comet, and the word "Comet" written in script thereunder. It is difficult to conceive that goods bearing this mark would be known in the trade by any name other than "Comet." Moreover, **the failure of applicant to take any**

testimony for the purpose of showing that these goods were known or sold by the name "Star," justifies the belief that they are known as "Comet" goods.

The only feature which is common to the two marks is that of the star, and this is so combined in the registrant's mark with other matter that the two marks would not be likely to be mistaken one for the other.

This case is clearly distinguished from that of Hutchinson, Pierce and Company v. Jacob J. Blumberg, 51 F. R., 829, in which it appears that the defendant not only made the representation of a star a prominent and independent feature of his mark, but also used the word "Star" in connection therewith in such a way that purchasers were deceived into buying the goods of defendant for those of complainant. It must be held that the marks of applicant and registrant, each taken as a whole, are so unlike in appearance as not to be likely to cause confusion or mistake in the mind of the public or deceive purchasers.

Applicant contends, however (brief, pages 2-6), that registrant has no right to use the representation of a star, even when combined with other features; that the use of any other features therewith cannot give registrant the right to use the representation of a star regardless of whether the two marks, each considered as a whole, are so unlike in appearance as to cause confusion in the mind of the public, and that the use of these additional features, by analogy to patent law, resembles the limitations of a claim of a patent and cannot avoid infringement. Applicant has cited numerous cases to support this contention only two of which need be considered here in detail. In the case of Bass & Company v. Feigenspan, 96 F. R., 206, which did not involve unfair competition, the court held that neither the monogram of defendant, the gold border nor scroll tracing *formed a part of the*

mark, but were mere accessories; that the essential and prominent feature was the triangle, and this conclusion was reached by comparing the marks of the complainant and defendant as a whole. In the case of Enoch Morgan's Sons & Company v. Ward, 152 F. R., 692, the remarks of the court, cited by applicant on pages 4 and 5 of its brief, were made with reference to the *dress* of the competing article such as the color of the wrapper and *not* to features constituting part of the mark. Following these remarks, the court then directly compares the marks of the complainant and defendant, each being considered as a whole, for the purpose of ascertaining the question of infringement. Nothing is found in either of these cases or in the other cases cited by applicant to sustain its contention that a property right may be had in an element of design used for trade-mark purposes which may be enforced against any users of the element no matter how different the design may be in which they employ the element, and that contention is regarded as unreasonable.

On the other hand, the U. S. Supreme Court in the case of Liggett & Myers Tobacco Company v. Rudolph Finzer, 128 U. S., 182, brief of registrant, page 8), held that the representation of a star with the word "Light" therebelow thus forming the word "Starlight" did not infringe the representation of a star.

It is therefore adjudged that registrant, Joseph Loewy, was entitled to the use of the mark shown in the certificate of registration No. 56,102, at the date of his application therefor and the application for cancellation is dismissed."

This case went before the Commissioner of Patents on appeal on a state of facts substantially similar in all respects to the facts in the present suit. That was a pro-

ceeding for cancellation of the registration of Loewy, but the testimony taken and the briefs submitted for both parties were similar and might almost be said to be identical, as they were certainly identical in subject-matter and substance. Upon the appeal the decision of the Examiner of Interferences was affirmed by the Assistant Commissioner employing the following language:

Opinion of Commissioner of Patents.

Appellant's mark was registered April 3, 1906, No. 51,146. It consists of the representation of a star and the words "STAR," and is applied to shirts, shirtwaists, and blouses. Appellee's mark is described as consisting of a representation of a comet and the words "THE COMET." This representation as it appears in the drawing forming part of the registration is not of the usual character. A comet is ordinarily represented as having a nebulous head, whereas in appellee's drawing the head of the comet consists of a star, which is given great prominence with respect to the other features of the mark.

Appellant seeks the cancellation of appellee's mark, alleging that the representation of a star and the word "STAR" are the exclusive property of appellant; that appellee's use of the representation of a star is an unwarranted invasion of appellant's property rights therein, and that appellee has no right to use this symbol either alone or in combination with other devices.

It appears from the record that appellant was the first to adopt and use its mark, and if it is found that the marks of appellant and appellee are identical, it would follow that appellee had no right to use his mark at the time the application for registration was filed.

I agree with the conclusion of the Examiner of Interferences that the marks are not identical, and that there is no such near resemblance between them as to be likely to cause confusion in trade. Appellant's mark consists, as above stated, of the representation of a star and the word "STAR," while appellee's mark has in addition to the representation of a star a streamer representing, it is said, the tail of a comet, and the words "THE COMET" printed in large type. These marks give an entirely different impression to the eye, and there seems to be no likelihood that appellee's goods would be referred to as "star goods" instead of "comet goods." There seems to be no likelihood of confusion either in the appearance of the marks or in the sound of the words by which the goods of the respective parties would probably be referred to.

Appellant makes the contention, however, that as it has the exclusive right to the use of the mark, consisting of the representation of a star and the word "STAR," no other person, firm or corporation has the right to use the representation of a star alone or with accessories, no matter what the character of such accessories may be. A number of authorities are cited in support of this contention. These authorities have been examined in connection with appellant's argument, but it is believed that they do not sustain this contention. As I understand the decisions on this subject, they go no further than to hold that an infringement of a technical mark can not be avoided by the use of accessories which do not form part of the mark, and which do not in fact change the substantial identity of the mark. One of the principal decisions relied upon by appellant is the case of Bass & Company v. Feigenspan, 96 Fed. Rep., 206, 212, from

which appellant gives copious extracts. In this decision the court said:

> "No one who has counterfeited a legitimate trade-mark and applied the spurious symbol in competition with the genuine can avoid the charge of infringement by showing that the false mark has in practice been so accompanied on labels, capsules, or other accessories, not forming part of it, as to render it unlikely that the public has been deceived. * * * A sound public policy requires that the spurious trade-mark be suppressed, whether it is or is not for the time being accompanied by such accessories, not constituting part of it, as to avoid deception or render it unlikely."

The court carefully points out in this decision that the accessories used by the infringer **did not constitute a part of the mark.** In the present case the features of appellee's mark referred to by the appellant as accessories form an actual part of the trade-mark, and in my opinion are so combined with the representation of the star which forms the head of the comet in appellee's mark as to be clearly distinguishable in appearance from that of the appellant. Furthermore, there would seem to be no phonetic confusion between the trade-marks, when the words defining the same are spoken, for the appellee's goods would probably be known as "THE COMET" goods, and the appellant's goods would be known by no other name than the "STAR."

The decision of the Examiner of Interferences is affirmed.

The decision of the Commissioner of Patents is not inserted here as being authority or binding upon the court

in any particular, but is the opinion of a tribunal which by reason of handling very large numbers of similar cases is unusually familiar herewith, and by reason of the provision of the statute that appeals may be taken from the Commissioner of Patents to the Court of Appeals of the District of Columbia, occupies a position similar to the opinion of the trial court from which this appeal came, and is simply cited to strengthen the weight of that opinion.

In conclusion the attention of the Honorable Court is invited to the next following pages upon which are exhibited the registered trade-marks of both the complainant and the defendant and the label employed by defendant upon boxes with the request that the court carefully compare such with the exhibits introduced by the complainant. From the cloth specimens forming a part of this brief it will be readily seen that defendant employs both a red and a black label to mark his goods, whereas the complainant employs only the red label. In the matter of marking the boxes complainant employs a neutral color, whereas defendant imprints his trade-mark, "The Comet" in noticeable red upon the label. The **star** of defendant's label is in size sufficient to cover substantially the whole width of the label, while defendant's **comet** is but small and occupies a position at the extreme end of the label as distinguished from complainant's **star,** which is placed in the middle of the label. All of these points above mentioned are such as to distinguish the make of one party from that of the other so as to prevent confusion and, while it is, perhaps, true that the Court will not look for differences, but for similarities between marks, it is believed in the present case the differences far outnumber the similarities and greatly pre-

dominate in matters of importance so that many more differences than similarities will be found by the court if looked for.

It is not, of course, contended that the decisions of the several tribunals of the Patent Office are decisions of a court, even inferior in its jurisdiction to the present court, but as such tribunals are almost daily called upon to pass upon the question of similarity of trade-marks as presented in interference, opposition and cancellation proceedings, it is contended that they have become expert upon such lines and that a decision from the Patent Office is of greater weight than a decision from a court of jurisdiction which would be considered concurrent in scope, if such might exist, the decision, however, being more in the nature of expert testimony than an adjudication which could be properly considered by the present trial court.

One other point should also be considered by this Honorable Court before deciding the question of whether or not the mark of defendant infringes, and that is the question of laches.

It is shown in the testimony of the complainant herein that the mark of defendant has been used since 1867 by the defendant and his immediate predecessors in business, and that the goods bearing such mark have been sold in great quantities in a large number of States, and especially in the States in which the complainant has its offices and manufacture their goods, namely, New York and Connecticut.

Mr. Brown in his testimony testified that so far as his knowledge went, complainant did not have notice or any knowledge of the use by defendant of the mark until October, 1903, but **there is no evidence whatever that officers of the corporation prior to that time did**

not actually have full knowledge of the use of the mark by defendant, the said Brown having assumed the duties of President in January, 1905, and admitting that the matter in 1903 came to the attention and was managed by the then president, Mr. Pierce. It is not at all probable that shirts in such large quantities could be sold in the States as testified to by Mr. Loewy on **behalf of the complainant,** without coming to the attention of other shirt manufacturers doing business in the same States.

In Sir Peter Coats et al. v. Merrick Thread Co. et al., 149 U. S., 562, Law Ed., 852, this court says:

> "This intent to imitate plaintiff's spool heads, if any such intent existed, is manifest rather in the label than in the periphery, but plaintiffs having submitted to this without prejudice for twelve years, have waived their rights to relief upon this ground."

Quoting McLaughlin v. People's R. Co., 21 Fed. Rep., 574; Ladd v. Cameron, 25 Fed. Rep., 37; 3 Robinson, Sec. 1149, the former of which citations is for a patent, the court saying:

> "Now, generally speaking, the laches of complainant is sufficient ground for non-interference on the part of a court of equity. Nearly all of the lifetime (13 years) of this patent the complainant has remained silent, by his silence consenting to, or at least acquiescing in the acts of the defendant. To interfere now by injunction would seem inequitable."

As in the patent, so in the trade-mark. The silence of complainant for thirty-eight years should clearly estop them at this time from raising the question of the validity of property rights of the defendant in the trade-mark.

In Robinson on Patents, Section 1194, the author lays down this general rule:

> "Another reason is found in the plaintiff's acquiescence in the infringement, or his laches in the enforcement of his rights. The unwilling submission of the plaintiff to injuries which he could not resist does not prejudice him in a court of equity. But an intelligent and voluntary consent, even though manifested only by inaction, for any considerable period, if unexplained, is a fault that may deprive him of a remedy which otherwise he would have obtained. * * * A similar result follows from the unreasonable delay of the plaintiff in instituting actions, though he has never intentionally submitted to an infringement."

The above quotation, cited by this court in Coates v. Merrick, has the weight of a decision of the court, and, though applied by Robinson to patents, having been quoted by this court with approval in a trade-mark case, as equally applicable thereto, is particularly applicable to the case at issue.

It is thought necessary to call the attention of this Honorable Court to several obvious attempts in the brief of appellant to purposely mislead the court as to the facts. For instance on page 7 of the brief there appears a mark which is a portion of an alleged advertisement said to have appeared in the Haberdasher of October, 1903, and reproduced on page 64 of the transcript. As the mark stands on page 7 the representation of the comet is disassociated from the word "Comet" and is emphasized and exaggerated to a very considerable extent. Instead of considering the mark as appearing upon page 7 the court is respectfully requested to confine its consideration

to the full exhibits as introduced and as appears on page 64.

Even this exhibit is not believed to be proper subject matter for consideration. If it has any bearing in the case at all it has a bearing upon the question of unfair competition in trade and not a question of infringement of trade-marks as it relates wholly to an advertisement and not to the mark as used upon the goods. It is believed that the position assumed by the Court of Appeals is unassailable that by reason of lack of diversity of citizenship questions could be considered as between the parties resident of the same state, except such as are given expressly in the jurisdiction of the court by the statutes. The statutes have never given the Federal court jurisdiction over questions of unfair competition in trade between residents of the same State and consequently all questions of unfair competition must be eliminated in the present case, and the advertisement which appears upon page 64 of the transcript relates to this branch of the case.

Upon page 8 of the brief, near the top, occurs this paragraph:

> "The * * * complainant succeeded in finding one of respondent's shirts in Connecticut and instituted this suit (page 8). The mark on this shirt is reproduced on page 63 of the record."

This sentence just quoted is absolutely false in every sense of the word and is further intended to be misleading to the court first, for the reason that the suit was begun on the *14th day of May*, 1906, and the shirt mentioned above was not purchased until *June* 28, 1906, *six weeks after the suit was begun* as appears on page 18, Q. 26 of the transcript.

Furthermore, the paragraph just quoted is absoutely false in assuming that the shirt under discussion was one of respondent's manufacture. There is not one word of evidence introduced which properly connects the respondent with the manufacture of the exhibit. Appellant had every opportunity which is granted by law and the rules to put on the stand the dealer from whom this shirt was purchased to testify where he purchased this shirt, but they refused to do so and relied wholly on their witness Loewy to identify the shirt as of respondent's manufacture. This the witness refused to do and only grudgingly admitted that the mark appearing upon the shirt was similar to respondent's mark but never under any circumstances testified that the mark was the same as respondent's mark or that the shirt was of respondent's manufacture.

On the same page of respondent's brief near the bottom appears this statement:

> "Two of his (respondent's) witnesses say that the mark formerly used by respondent was a comet with a point formed by nebulous matter and not by a star or pointed figure (p. 76 and p. 78). The statement of the third witness, the respondent, to the contrary, in view of the evasive character of his testimony is not, we think, persuasive."

In this respect it is pointed out that *the respondent did not take the stand in his own behalf* and appeared only as a witness for the appellant. The appellant chose to assume the risk of putting the respondent on the stand in appellant's behalf and must abide by the consequences and the testimony thus produced. The testimony taken on behalf of the appellant itself is that the respondent has

used a mark *similar* to that shown on page 63 of the transcript for many, many years.

Under the heading, "The Law," on pages 10 and 11 of appellant's brief, is a quotation from section 16 of the trade-mark act to the effect that registration of marks is prima facie evidence of ownership. This section applies as well to the mark of respondent as to that of appellant as both marks are registered. Both having been registered prior to the beginning of this action the prima facie right of appellant is totally negatived by a similar prima facie right on behalf of respondent.

As stated at the beginning of this brief it is still contended that this court has no jurisdiction of appeal under the trade-mark statute from the Court of Appeals as while the statute does not in so many words enact that the Court of Appeals is final it did enact that the appellate jurisdiction of the Court of Appeals is similar to that in patent cases which had been held to be final. However the court may look at the matter, whether that they have no jurisdiction, or whether they may consider the merits of the appeal is thought to be immaterial as far as respondent's rights are concerned as it is believed the law and the facts are wholly with the respondent, and that even considered upon the merits the appeal should be dismissed for want of such merit.

Respectfully submitted,

E. T. FENWICK,

L. L. MORRILL,

Solicitors for Respondent and of Counsel.

DARK PAGE E

TRADE-MARK.

No. 51,146. REGISTERED APR. 3, 1906.

HUTCHINSON, PIERCE & CO.

SHIRTS, SHIRT WAISTS, AND BLOUSES.

APPLICATION FILED APR. 28, 1905.

STAR

TRADE-MARK.

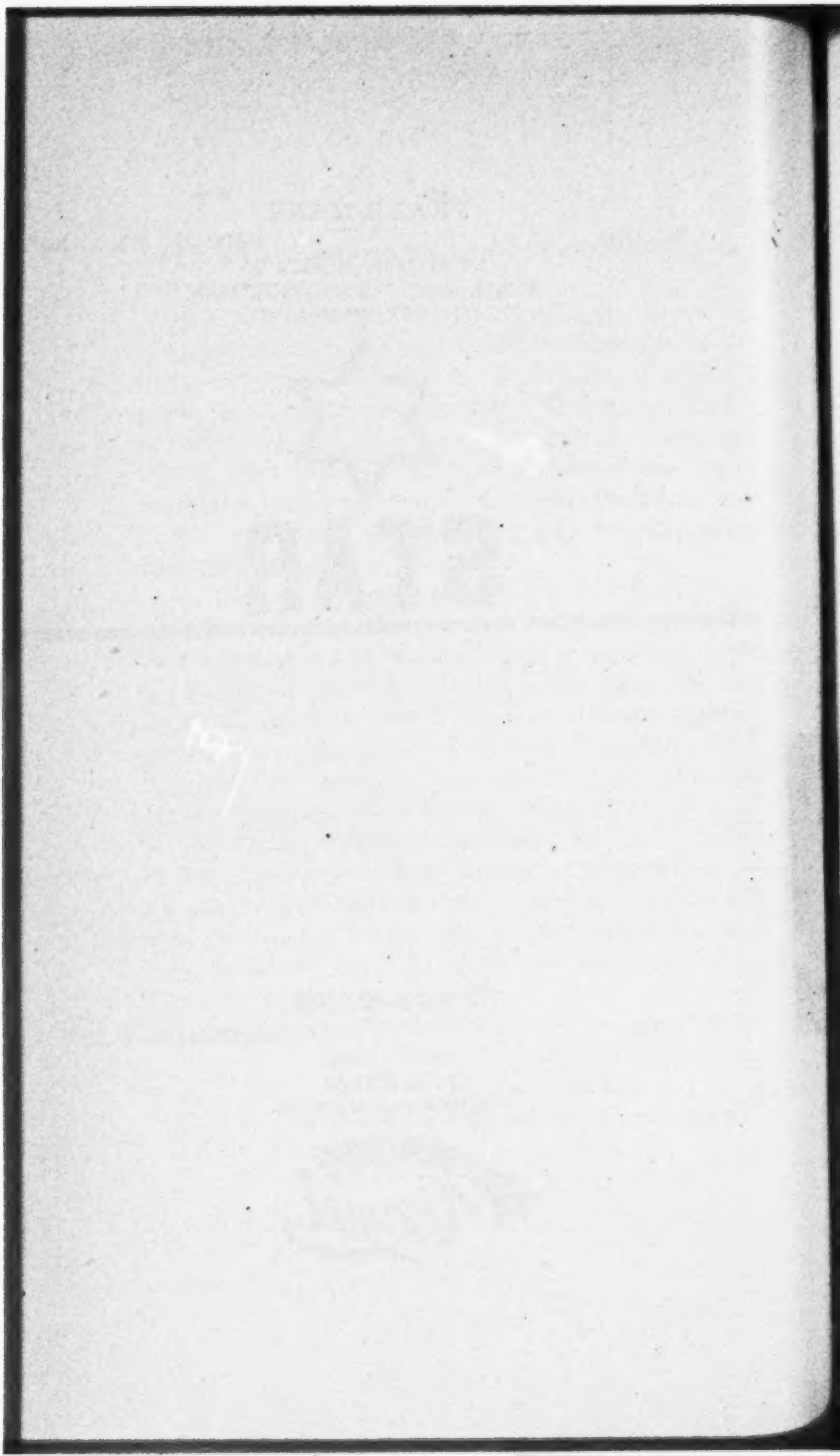
No. 56,102. REGISTERED AUG. 21, 1906.

JOSEPH LOEWY.

DRESS SHIRTS.

APPLICATION FILED MAR. 29, 1906.

LEED THRU



DARK PAGE BLEED

THE COMET
TRADE MARK
THE Comet SHIRT
LOT.
DOZ.
SIZE.